

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RUSSELL BUCKLEW,)
)
Plaintiff,) No. 14-08000-CV-W-BP
) March 15, 2017
V.) Kansas City, Missouri
) CIVIL
GEORGE LOMBARDI, et al.,)
)
Defendants.)
)

TRANSCRIPT OF TELECONFERENCE

BEFORE THE HONORABLE BETH PHILLIPS
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

APPEARING BY TELEPHONE

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MARCH 15, 2017

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THE COURT: Good morning, this is Beth Phillips.
Who else do we have on the line?

MS. CARLSON: Good morning, Judge Phillips, this is
Kathleen Carlson on behalf of plaintiff, Russell Bucklew, and I
have some of my colleagues from Sidley Austin with me.

MS. PILATE: Good morning, Your Honor, this is
Cheryl Pilate. I am present for plaintiff, as well, but in a
separate office.

MR. SPILLANE: Your Honor, this is Mike Spillane for
the defendant. I have Miss Coulter, Mr. Logan, and Mr. Hansen
with me.

THE COURT: Well, thank you for calling in. I have
reviewed the summaries that the parties provided and have a few
questions.

Mr. Spillane, I'm a little unclear on -- let's start
with the privilege log. I'm a little unclear on whether you
have provided a privilege log or you've just made the statement
that the information is privileged for various reasons. So has
a privilege log been provided?

MR. SPILLANE: No, Your Honor, a privilege log has
not been provided.

THE COURT: Okay. I --

MR. SPILLANE: Miss Coulter, go ahead.

1 MS. COULTER: I'm sorry, Your Honor. There has been
2 information, for example, that was specifically identified as
3 privileged where we included the information that would
4 necessarily be included on a privilege log.

5 The other thing that the defendants also did, Your
6 Honor, is we provided a production log identifying which
7 documents we did produce, and we identified the one document
8 that was also discussed in the contents of the answer, saying
9 why, the date, and giving a description of the item that was
10 withheld.

11 So to say that no privilege log -- I mean, there's
12 no step for, I guess, additional documents besides what was
13 discussed -- that was specifically discussed in the responses
14 and identified on a production log.

15 THE COURT: Okay. So have all of the withheld
16 documents at least been identified and the basis for the
17 privilege stated?

18 MS. COULTER: Yes, Your Honor. Based on my
19 information and belief, all withheld documents, or with the
20 caveat that we talked about in our memo where there were
21 documents that we could not identify whether we had or did not
22 have, have been identified based on, as I kind of also
23 discussed too, some of the breadth of the requests. You know,
24 we made all good faith and reasonable efforts to identify this
25 information.

1 MS. CARLSON: Your Honor --

2 THE COURT: Let me ask a quick question before
3 counsel for plaintiffs step in.

4 And so tell me again why there is some information
5 that you could not identify?

6 MS. COULTER: Well, for example, Your Honor, in some
7 of the requests for production of documents, plaintiffs
8 routinely asked us to provide any -- like, for example, in
9 Production 1, all documents, including communications related
10 to DOC's execution procedures for lethal injection and lethal
11 gas. It also asks us to identify any communications. In
12 Production 7, for example, it talks about any communications to
13 or from or authored by my DOC employee or agent pertaining to
14 execution by lethal injection.

15 Some of these topics, what it was doing was getting
16 into are, for example, any communications that, for example,
17 our office would have had regarding any of the 19 executions
18 that have been carried out, that could have been related to any
19 of the communications we had regarding any of the methods of
20 lethal injection cases that have been before, because,
21 unfortunately, the other issue that we had with the discovery
22 is that none of it was limited in any type of time frame. And
23 so --

24 THE COURT: And so it's --

25 MS. COULTER: I'm sorry, Your Honor.

1 THE COURT: And so it's essentially just -- so
2 essentially it's that the requests you're saying are overbroad
3 and --

4 MS. COULTER: Yes.

5 THE COURT: -- for that reason, you can't
6 necessarily identify all of the -- all of the documents.

7 MS. COULTER: Correct, Your Honor.

8 THE COURT: Okay. Miss Carlson, was it you who was
9 trying to step in a minute ago?

10 MS. CARLSON: Yes. I just wanted to -- I'm sorry
11 for interrupting you.

12 THE COURT: No, that's fine.

13 MS. CARLSON: So I have actually asked defendants'
14 counsel the exact same question as you had asked, you know,
15 have you identified all of the documents. And, you know, I
16 think she has answered it in a similar way, saying yes, but
17 then with a lot of caveats.

18 And so I think I'm still confused because there are,
19 you know, somewhere in the vicinity of 15, you know, RFP
20 responses where they claim that documents have been withheld or
21 that it calls for privileged information, and then so far, we
22 have -- they have identified on a log one document that they
23 have withheld because of privilege.

24 And so I'm confused whether their response is, yes,
25 we've withheld -- we've identified everything, so it's this one

1 document, or, no, we haven't. Or -- and I understand that
2 their response is that the requests are overbroad, but
3 obviously they interpreted the requests in a certain way in
4 order to produce documents, and so I think that a privilege log
5 is separate and apart from all relevance or overbreadth
6 objections. So to the extent that they've interpreted the
7 document requests in a certain way, whatever documents fall
8 within their interpretation of that request, if there are any
9 privileged documents that fall within that -- you know, their
10 interpretation, then those should be identified. If they're
11 saying there are none, no other documents, other than the one
12 that they claim -- that have been identified, that's fine, but
13 we would want to know that and, thus far, I haven't been able
14 to get a clear answer to that.

15 THE COURT: So, Ms. Coulter, it doesn't look as
16 though -- I guess here is my question. Why don't you just put
17 together a privilege log? It doesn't look as though there are
18 a large number of documents. It seems to be the --
19 procedurally the proper way to go, the cleaner way to go, and
20 the easiest way to address this issue.

21 MS. COULTER: Well, and, Your Honor, I think Mike
22 Spillane and I both can talk on this topic. And I understand
23 Your Honor's position thinking that it's not necessarily a
24 burden to create a privilege log, but I guess I would add, the
25 other documents, aside from the one record that we identified,

1 we also noted that there would have been two communications had
2 by Director Lombardi with counsel, but he can't recall the
3 specific dates or times.

4 But the other issue that we have, too, is, for
5 example, we can't identify -- we can't say whether we have or
6 do not have certain records that were requested in some of the
7 interrogatories. My recollection is it's only in response to
8 an interrogatory -- or, excuse me, Request For Production of
9 Document 2.

10 We have in the past made a good faith effort to
11 identify those records, produced sealed privilege logs
12 identifying that we may or may not have certain records, but
13 yet, even by us admitting that we have those records, that
14 information has been utilized or could be utilized to identify
15 execution team members. And that information has been released
16 publicly, even under seal and saying that it's not going to be
17 disclosed.

18 MR. SPILLANE: If I may, Your Honor, I think what
19 we're talking about specifically here is whether or not we have
20 package inserts. Package inserts, if we have them, would be
21 identical to what can be found on the internet. But if we say
22 or do not say we have them, then that would go to whether we
23 used manufactured or compounded pentobarbital.

24 And we litigated this recently in *In Re: Missouri*
25 *Department of Corrections* under a -- in the Eighth Circuit on a

1 mandamus writ. And it's a slightly different case, but we
2 prevailed on that, and, as a practical matter, the things ended
3 up in the press anyway, at least references to the privilege
4 logs and our sealed arguments.

5 So the one thing that we really care about not
6 saying that we have or don't have are package inserts. And if
7 we do have them, which we're not saying we do, identical ones
8 could be pulled off the internet.

9 THE COURT: Well, then, this seems to be -- so this
10 seems to, then, be related to the last issue I was going to
11 raise, which is the information about the drugs' side effects.
12 So --

13 MS. CARLSON: And, Your Honor, before we get to
14 that, I mean, I understand that that might be a separate issue,
15 but they've asserted several privileges here: attorney/client
16 privilege, they've asserted state secrets, and they've asserted
17 deliberative process privilege. Which, you know, I will note
18 is a qualified privilege that we're, you know, entitled to
19 challenge, but we cannot do so if we don't have any information
20 on the documents withheld.

21 So I would just -- before we get to sort of the side
22 effects issue, which I view as a separate issue, and I, you
23 know, think we can address that separately. And I don't think
24 that we are demanding that they produce a package insert, but I
25 would just ask that they provide a privilege log.

1 THE COURT: So Mr. Spillane or Ms. Coulter, other
2 than the indication as to whether or not you have package
3 inserts, are there any other documents that you're withholding,
4 other than the one that was included on the privilege log?

5 MS. COULTER: Your Honor, I guess to answer that
6 question, I'd like to also maybe respond just generally to the
7 statements made by counsel saying that we did assert several
8 other privileges.

9 To answer your question, that is correct. Our
10 interpretation within the scope of this Court's order, there
11 was one memorandum that was withheld from 1988 between DOC
12 legal counsel and the warden of M.S.P. at the time. That was
13 identified to opposing counsel.

14 Additional privileges were asserted in response to
15 their requests for production of documents and requests for
16 discovery because those requests routinely went into
17 information that this Court had already held was not relevant.
18 For example, they sought record and information, documents,
19 communications regarding prior lethal injection protocols, the
20 development and adoption of DOC's current lethal injection, you
21 know, communications regarding the training of team members,
22 detailed information regarding team members, purchase and
23 procurement, et cetera. And we have taken a position, and I
24 don't believe that we are required to identify documents that
25 are withheld on the basis of privilege when this Court has

1 already said those documents are not relevant.

2 THE COURT: So has discovery closed in this case? I
3 don't have the scheduling order in front of me.

4 MS. COULTER: It has, Your Honor.

5 MS. CARLSON: Close of discovery was this past
6 Friday.

7 THE COURT: Okay.

8 MS. CARLSON: And we were trying to get our motion
9 on file on Friday but understood that we, you know, wanted to
10 have this conference first.

11 THE COURT: Here is the reason I ask the question is
12 that I think, given the positions of the parties, I need some
13 briefing on this issue. I don't have the actual requests in
14 front of me, and so for me to conclude that the information --
15 or the requests that the defendants are not answering because
16 it falls into -- within my prior ruling on the appropriate
17 topics, I think I need to have the requests in front of me.

18 And so in order -- I don't do this very often, but I
19 do think that on this particular issue, some briefing would be
20 helpful, given the detail with which I would need to review the
21 requests and the areas to which the plaintiff is seeking
22 information.

23 And so, Ms. Carlson, could you -- it seems to me
24 that a brief motion to compel would be appropriate, and then
25 the -- the opposition to the motion to compel and the reply

1 would be a little bit more meatier. And so I'm really not
2 looking for parties to waste time on this issue, but I do think
3 that some reference to the specific request is appropriate in
4 this context.

5 MS. CARLSON: Yes, Your Honor, I agree, and we will
6 be prepared to submit a brief in short order. So whatever the
7 Court orders, we can file something.

8 THE COURT: Do you think that you can get -- again,
9 I think that the initial motion could be pretty brief. Do you
10 think you could do it in a week?

11 MS. CARLSON: Yes, Your Honor, absolutely.

12 THE COURT: Actually, you know what? Yeah, if you
13 could do it in a week, that would be great.

14 MS. CARLSON: Absolutely, Your Honor, no problem.

15 THE COURT: Again, I'm not going to be grading your
16 work on the quality of the product because I do think that the
17 response and the reply is going to be more helpful to me.

18 MS. CARLSON: Okay.

19 THE COURT: So let's move, then, to the next issue
20 regarding more information from M2 and M3. I again, either Ms.
21 Coulter or Mr. Spillane, have some questions for you.

22 Why are you opposed to providing the previous
23 depositions of M2 and M3?

24 MR. SPILLANE: Your Honor, there are a couple of
25 reasons. One, we think it's outside the scope because the only

1 issue left in this case is Claim 1 that says no matter how we
2 execute, lethal -- use lethal injection or who does it, it
3 violates the Eighth Amendment as applied to Mr. Bucklew.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 So I'm not sure there's anything that is helpful to
3 the claim that they actually make that would be aided by
4 bringing in these three depositions. And if we do bring them
5 into this litigation, that invites the same problems we've had
6 before about trying to keep them sealed, and we think that
7 would be unduly burdensome in light of the limited information
8 they would provide in light of Mr. Bucklew's specific claim.

9 THE COURT: So, Ms. Carlson, I'm most interested in
10 why you think this information is relevant, given the claim
11 that remains in this case.

12 MS. CARLSON: Yes, Your Honor, I'm happy to address
13 that.

14 So the first thing I will say is, you know, we
15 are -- we, being Sidley Austin, are a little hamstrung by the
16 fact that we don't know specifically what is in those
17 depositions. But I will say that during the deposition of
18 defendants' expert, Dr. Antognini, specifically relied on the
19 fact and assumed in his report and during the deposition that
20 the persons M3 and M2 would have the requisite training
21 necessary to carry out the executions.

22 Secondly, during the deposition of our own expert,
23 Mr. Spillane asked our own expert several questions about
24 training relating to inserting IV lines, et cetera, clearly
25 getting at, you know, what the process would be for an

1 execution with respect to IV lines that is directly relevant,
2 you know, they've put it at issue.

3 And I think, third, is that their protocols
4 specifically state -- they've now produced the open protocols
5 and the closed protocols. But the open protocols specifically
6 talk about the process for inserting an IV line and state that
7 it can be done a certain way, assuming that the person had the
8 requisite training and experience in order to do it. So the
9 training and experience relating to IV lines is now directly at
10 issue, based on documents that they've produced and testimony
11 and expert reports that they've produced in this case.

12 THE COURT: Well, I guess I take issue with the fact
13 that because a question was asked or documents were produced in
14 discovery that, thereby, that makes it relevant, because
15 obviously discovery is much broader than the issues that will
16 be permitted to be discussed at trial.

17 Can you tell me what types of experts these are?
18 Again, if the claim is that any type of lethal injection is a
19 violation of the Eighth Amendment, then I'm still unclear as to
20 why the training of the person who is involved in the lethal
21 injection is relevant.

22 MS. PILATE: May I briefly say something, Your
23 Honor? This is Cheryl Pilate.

24 Rusty Bucklew was a plaintiff in both of those
25 cases, and I was one of his counsel. And, of course, with the

1 Eighth Amendment claim, we have to show that the pain reaches a
2 certain excruciating level, it's highly likely that the
3 prisoner will experience excruciating pain. So I mean, we have
4 to show that.

5 Now, without revealing what's in the depositions,
6 and I'm trying to be careful here -- and I am in a very odd
7 situation in terms of having the depositions right in front of
8 me, having the knowledge, which is, of course, imputed to
9 plaintiff, and he's been a party in all of these cases.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 THE COURT: Well, Miss Pilate, I'm going to
24 interrupt you.

25 As I recall, there was a claim challenging the

1 qualifications of the personnel and, if I recall correctly, I
2 dismissed that claim. I also, again, just do not see how the
3 issue of -- I mean, given the fact that the remaining claim is
4 that any type of lethal injection is unconstitutional with this
5 particular defendant -- or this particular plaintiff, I again
6 just don't see how this is relevant.

7 Since we are going ahead and briefing the other
8 issue, I will give the plaintiff the opportunity to include an
9 argument with respect to this issue in the briefing. But I
10 will tell you at this point, based upon the information that's
11 in front of me, I do not see how information from M2 and M3 is
12 relevant to the one remaining claim in front of me. I will
13 defer ruling, and, if the plaintiffs want to add anything on
14 this issue in the briefing, they can do so.

15 MS. CARLSON: Thank you, Your Honor, we will. Thank
16 you very much.

17 THE COURT: Moving now to the information regarding
18 the chemicals' side effects, this seems to be somewhat related
19 to the issue of the privilege log, but, Ms. Carlson, why don't
20 you explain to me why you think that this is relevant, again,
21 given the one remaining claim that we have in this case.

22 MS. CARLSON: Yes, Your Honor. So I think, you
23 know, the plaintiff has consistently -- I'm sorry, the
24 defendants have consistently indicated that this request seeks,
25 you know, the package insert, and that would cause them to

1 reveal some sort of state secret. I think, you know, we are
2 comfortable that they do not need to produce the package
3 insert, if that's their concern; however, to the extent that
4 they do have communications regarding how the drug works in the
5 context of a lethal injection, I think that the protocols that
6 they have produced have a lot of holes, and we have absolutely
7 no idea what happens when there are complications relating to a
8 lethal injection. So to the extent that they have any
9 communications relating to such complications and what would
10 happen in that instance, I think that is directly relevant to
11 the excruciating pain that Mr. Bucklew might suffer during
12 execution by lethal injection.

13 MS. PILATE: Excuse me, Your Honor, those were -- I
14 mean, that specific topic was also addressed in one of M3's
15 depositions.

16 THE COURT: And so, Mr. Spillane, do you have any
17 information on this topic that would not consist of package
18 inserts?

19 MR. SPILLANE: I have been told that the Department
20 of Corrections has been questioned on this point and has
21 responded that, no, they do not. Without saying that they do
22 or do not have package inserts, that they do not have anything
23 else.

24 Is that correct with your conversations with them,
25 Ms. Coulter?

1 MS. COULTER: Yes, Your Honor.

2 THE COURT: So, Ms. Carlson, if you don't believe
3 that the package inserts are -- need to be turned over, if they
4 do exist, and that the department doesn't have any additional
5 information on this topic, then what is it that you're seeking
6 from the defendants?

7 MS. CARLSON: So, Your Honor, I think a couple of
8 points to that. So I think maybe this is the first time that
9 we've heard that they don't have any additional information is
10 my first point; and second point is I think Mr. Spillane just
11 said that he has been told that the Department of Corrections
12 has been asked in another proceeding.

13 And so I think this sort of dovetails to our concern
14 regarding discovery generally, and our concern that is raised
15 in Point 4 in our letter is that I'm just not sure the level of
16 investigation that has been done to confirm that no information
17 exists.

18 For instance, during Director Lombardi's deposition,
19 he testified that he had not been asked to look for documents
20 and has not searched for documents; and then, you know, sort of
21 one day before the close of discovery, we got supplemental
22 documents that were years and years old, so were not things
23 that had just been created.

24 And so it appeared to us that, perhaps, an
25 exhaustive search had not been done, and we're still calling

1 that into question, especially in light of the fact that I
2 think less than five e-mails have been produced in this case,
3 so I'm not sure that any sort of e-mail search has been done to
4 actually determine whether there are responsive documents here.

5 THE COURT: And so does --

6 MR. SPILLANE: If I may correct one thing, Your
7 Honor, my response referred to this case. That's what I just
8 asked Ms. Coulter, if she had spoken to DOC in connection with
9 this case, if they had any documents that dealt with side
10 effects, and the answer was no. So that's not a past case,
11 that's this case.

12 MS. COULTER: Correct. And Your Honor, every time
13 we've communicated with counsel, we've informed and advised
14 them that, based on our information and belief and our
15 discussions with DOC, as well as the defendants, that all
16 responsive records have been produced. I mean, for counsel to
17 say that this is the first time they've heard this, I mean,
18 we've put that in writing in e-mail and in our letters and the
19 discussions that we've had.

20 And as to the documents that they say we just
21 recently produced, one of the issues the defendants discussed
22 and the Court is already going to have briefing on is just the
23 breadth and the scope of the request. One thing that we could
24 not narrow down, for example, is they asked for any and all
25 communications we have had regarding lethal gas. Lethal gas is

1 currently not a method of execution in Missouri; however, it
2 was from 1937 to 1965.

3 And so one of the things that we were trying to work
4 out with counsel, which it was my understanding and belief that
5 we didn't even get a time frame that we were going to agree
6 upon until March 7th, was some sort of time period to even
7 conduct some sort of reasonable search to try and find some of
8 these records.

9 Although we do not believe that the prior, you know,
10 records and documents regarding DOC's use of cyanide gas from
11 the '60s and earlier, or necessarily the old gas chamber, which
12 was discussed during the deposition, which was held in January,
13 were relevant, we certainly tried to make every good faith
14 effort to give them whatever responsive documents that could be
15 located. Those communications happened because the parties did
16 take good faith efforts to meet with and confer on some of
17 these discovery topics.

18 THE COURT: And so -- I'm sorry, was that Ms.
19 Coulter?

20 MS. COULTER: Yes, Your Honor, I apologize.

21 THE COURT: Okay. I tell you, if we have a future
22 telephone conference, I really think that it's important in
23 telephone conferences that we only have one counsel -- I think
24 it's important in hearings, but even more important in
25 telephone conferences that we only have one counsel for each

1 side speaking up. I recognize that discovery especially is
2 somewhat of a tag-team effort; but in telephone conferences,
3 it's really confusing if we have multiple people talking.

4 So this really just comes back to what has the
5 defendant done in order to document, certify, whatever we want
6 to call it, that the searches have been done and the
7 appropriate documents have been turned over? Mr. Spillane?

8 MS. COULTER: I guess that's what I'm -- I'm sorry,
9 Your Honor, this is --

10 THE COURT: Ms. Coulter?

11 MS. COULTER: Yes, Your Honor. And I guess that's
12 where I'm a little bit perplexed. I'm not really necessarily
13 sure if counsel is requesting or asking me, for example, to
14 memorialize all of the communications that we would have had
15 with DOC, all of the -- you know, there were several
16 communications that we had with DOC after we got the discovery
17 requests. There were certainly certain actions that DOC's
18 general counsel's office took to try to obtain these records.
19 There were a lot of individuals that were discussed.

20 It's my understanding that DOC's general counsel's
21 office would have went to the individuals who they believed had
22 the relevant documents or retained those documents to try to
23 locate this information. And even then, like I said, we've had
24 communications, it's my understanding they had communications
25 with the defendants personally. I had communications with the

1 defendants personally. And even after our meeting, there were
2 communications that we had with, again, DOC's general counsel's
3 office to see what could possibly or potentially be out there.

4 THE COURT: Okay. So let me --

5 MS. COULTER: I'm not sure if anything more needs to
6 be memorialized.

7 THE COURT: Let me -- let me interrupt you. In
8 plaintiff's submission, the last sentence says, "Plaintiff
9 seeks certification from each defendant that they undertook a
10 good faith effort to procure documents and to answer all
11 interrogatories."

12 It sounds as though that won't be any problem, Ms.
13 Coulter, if you have gone through all of the steps that you
14 just indicated. True?

15 MS. COULTER: Certainly, Your Honor.

16 THE COURT: Okay. If the defendants, then, could
17 provide a certification to defendant [sic] that they undertook
18 all good faith effort to procure documents and answer all
19 interrogatories, then that seems to address this issue.

20 It seems as though, however, that the discovery
21 requests on Issue No. 3, the chemicals' effects, that if the --
22 if the defendants do not have any of the documents that are
23 requested, then the plaintiffs are also entitled to an actual
24 interrogatory response, or whatever the nature of the discovery
25 request was, to that effect. So to the extent the defendant

1 has not responded in a fashion similar to what was stated
2 during today's telephone conference, then I think the
3 defendants also need to clarify that issue with an appropriate
4 discovery response.

5 MS. COULTER: And certainly -- I will certainly go
6 back and look, Your Honor. I think there were very few, if
7 any, in light of the original interrogatory responses and the
8 supplemental interrogatory responses where, even though we
9 certainly made the objections, that no information or no answer
10 was provided. But I will go back and look at that, certainly,
11 Your Honor.

12 THE COURT: Can you do that within the next five
13 days?

14 MS. COULTER: Absolutely.

15 THE COURT: Okay. Then, Ms. Carlson, to the extent
16 you still have concerns on these issues after that has been
17 done, any additional issue can be included in the motion to
18 compel that you're filing.

19 MS. CARLSON: Okay, Your Honor. That sounds fine.
20 And I would just want to confirm that they -- in connection
21 with the certification, that they searched e-mails of the
22 defendants, at a minimum, for relevant communications.

23 THE COURT: Ms. Coulter, I assume that wouldn't be a
24 problem. I would assume in this day and age that a document
25 search would include an e-mail search.

1 MS. COULTER: Well -- and, Your Honor, again, this
2 is Caroline Coulter.

3 This goes back, though, to some of the problems that
4 we do have regarding the breadth of the request. For example,
5 wanting any and all communications. I'm certain that I could,
6 perhaps, try to formulate, but, for example, we haven't
7 narrowed down to which specific individuals. I mean,
8 understand, of course, DOC -- I'm sorry. I'm having -- I
9 guess, I'm sorry, Your Honor, I apologize. I was distracted
10 for a moment.

11 But that's part of the problem that we have on
12 trying to narrow down at least a time period, if there are
13 specific individuals. Some of the requests, like I said,
14 wanted information, if there was any information regarding any
15 individual or agent in the DOC, without regard to their
16 position or whether or not they're even involved in making any
17 of these types of decisions.

18 So I think -- I guess that's what I'm saying, as
19 part of the request for additional e-mail searches, unless we
20 have further narrowing of some of these topics, that is the
21 issue that we have with trying to narrow and provide that sort
22 of information.

23 THE COURT: Well, I mean, at some point, then, we
24 may need -- this may take us full circle here and back to the
25 first issue, which is we may need more information, then, as to

1 how you interpreted the discovery requests in light of your
2 objection that some of them were overly broad to ensure that
3 the searches that you did are sufficient. And so that may be
4 an issue, then, that needs to be discussed when discussing the
5 privilege log, which seems to me to somewhat surround the issue
6 of your interpretation of these discovery requests.

7 MS. CARLSON: Your Honor --

8 THE COURT: This is a long way of saying that I'm
9 not real sure that this telephone conference has necessarily
10 been as helpful as I'd hoped, and, for that, I apologize. I
11 do -- I think that the parties who have been involved in
12 previous litigation can attest that typically these discovery
13 disputes can be resolved through a telephone conference. This
14 is one of the rare circumstances where I don't think that
15 that's going to happen.

16 Ms. Carlson, were you going to weigh in?

17 MS. CARLSON: Yeah. I was just going to say I
18 think -- and we can brief this for sure. I think this just
19 maybe comes down to a difference of opinion in terms of
20 responding to discovery requests because I think that what I'm
21 hearing is that, because the interpretation of the discovery
22 requests is that -- from defendants is that it was too
23 overbroad or vague or whatever the response might be that they,
24 then, couldn't do any searches of e-mails because of that. And
25 I think, you know, as a standard practice, you are obligated to

1 do the searches based on your sort of understanding of the
2 discovery request and your interpretation of what is relevant
3 and then, you know, to the extent that we then have problems
4 with the, you know, limitations that you pose on it, then we
5 can discuss it. Unfortunately, that hasn't been done here, and
6 so then we're sort of left in the dark completely about what --
7 you know, what efforts that they've undertaken.

8 So we're happy to brief this, and we can put it all
9 in our motion and then proceed from there. But apologies if
10 this is more complicated for you than normally.

11 MS. COULTER: Your Honor -- I'm sorry.

12 THE COURT: One thing I'd like to do, Ms. Coulter,
13 is see -- get some possibilities about shortening the briefing
14 schedule on this issue. If the plaintiffs can get the motion
15 on file within the next seven days, can you respond within the
16 following seven days?

17 MS. COULTER: I should be able to, Your Honor.

18 THE COURT: Okay. And then, Ms. Carlson, can you
19 get a reply within the next seven days?

20 MS. CARLSON: Of course, Your Honor.

21 THE COURT: Okay.

22 MS. COULTER: And Your Honor, I apologize. This is
23 Caroline Coulter. I don't want to have anything misunderstood
24 here. I don't want to indicate that there was no search of any
25 e-mails. There were searches that were conducted and e-mails

1 that were provided; however, there was no additional search.
2 For example, I didn't ask them and request them to provide me
3 any and all e-mails with the mention of the word "gas" or
4 "execution," just broadly asking. I think, again, this kind of
5 goes back to we tried to interpret to the individual defendants
6 and those specifically involved in this case.

7 But due to the breadth of the request, we'll
8 certainly brief it on this. I just did not want Your Honor to
9 understand that there was no e-mails or any type of search
10 conducted.

11 THE COURT: So have the parties had any
12 conversations regarding the objection and the areas of
13 discovery to which the parties can agree? I mean, sometimes
14 when there's an objection, for example, overly broad, then the
15 parties can talk and can agree, well, then, we're talking about
16 this particular time frame. Did that occur in this case?

17 MS. CARLSON: We had two telephone conferences, Your
18 Honor, and we did resolve some issues during those conferences.
19 I think a lot of it was left open, and then we received some
20 documents late last week. So we will certainly -- we're in the
21 process of reviewing those, and so we will certainly take that
22 into account when we file our motion so as not to unnecessarily
23 burden the Court.

24 THE COURT: Well, I will look forward to the
25 briefing. If the questions are answered in the briefing, then

1 we will try to get a ruling out as quickly as possible. We
2 will make this a priority, too, so as soon as the briefing is
3 completed, we can get an order out in short order. In the
4 event that the briefing raises any additional questions, I will
5 set up a telephone conference, but, again, will do so as
6 quickly as the briefing is completed.

7 Are there any other issues that I can take up at
8 this time? Okay. Hearing none --

9 MS. CARLSON: Thank you very much for your time.

10 THE COURT: -- I will take that as a no.

11 MS. COULTER: Your Honor -- Your Honor, I apologize.
12 Caroline Coulter with defendants.

13 One thing that did come up, I think -- I know you
14 indicated that you wanted the parties to file the motion to
15 compel and how to do briefing. It was my understanding that
16 defendant -- or plaintiff's counsel had indicated that some of
17 their motion that's already been drafted contained highly
18 confidential or discussion of highly confidential information.
19 So I just wanted -- perhaps, if maybe we can discuss briefly
20 how the Court would like the parties to proceed if the
21 documents may contain highly confidential information?

22 THE COURT: I was not a party to that conversation
23 or that e-mail exchange or whatever.

24 Ms. Carlson, do you predict the need to include
25 confidential information?

1 MS. CARLSON: Yes, Your Honor, I think so, because
2 we have some deposition testimony that we would need to cite
3 that defendants have designated as either confidential or
4 highly confidential.

5 THE COURT: I'm open to suggestions. Typically,
6 obviously, it would be filed under seal, and then we can access
7 it through ECF. It sounds to me that there have been some
8 problems with that approach in the past. And so, Ms. Coulter,
9 do you have a suggestion?

10 MR. SPILLANE: Your Honor, this is Mike Spillane. I
11 think if we -- if this is deposition testimony from this case,
12 I think under seal may be the way we have to go. I hope
13 they're not saying we're going to bring in deposition testimony
14 from other cases that's already under seal and under protective
15 orders in the other cases.

16 MS. CARLSON: No, Your Honor, we are not.

17 MR. SPILLANE: Okay. And I don't know how to solve
18 that, Your Honor. As you may know, we had in the *Jordan* case
19 which was -- went up on mandamus in *In Re: Missouri Department*
20 *of Corrections*, we had sealed in camera testimony that popped
21 up on ECF anyway and ended up in BuzzFeed. And I don't know
22 how we can stop that, except, you know, put it under seal and
23 be careful. Unless the Court has a better idea, because, you
24 know, that's happened to us a couple of times that the sealed
25 stuff has come out that's -- and I'm not sure there's a way

1 around it that I can think of.

2 THE COURT: I don't have any answers at this point.
3 And so I would just ask that the parties be careful and follow
4 the ECF procedures when filing something under seal. And
5 obviously, to the extent there's anything that the Court puts
6 on ECF that would contain confidential information, we will
7 obviously do the same.

8 If there is nothing further, then have a good rest
9 of the week.

10 (Teleconference concluded.)

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CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

March 17, 2017

/s/ _____
Kathleen M. Wirt, RDR, CRR
U.S. Court Reporter